IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-685

COUNTY OF SUFFOLK and CONCERNED CITIZENS OF MONTAUK, INC.,

Petitioners,

v.

SECRETARY OF THE INTERIOR,

Respondent,

NATIONAL OCEAN INDUSTRIES ASSOCIATION and NEW YORK GAS GROUP,

Intervenors-Respondents.

SUPPLEMENTAL APPENDIX

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Dated: February 8, 1978

Decision, Hon. W. Arthur Garrity, Jr., District Judge.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 78-184-G

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

—VS—

CECIL D. ANDRUS, ET. AL.,

Defendants.

BEFORE: Hon. W. Arthur Garrity, Jr.
District Judge

Court Room No. 5
Federal Building
Boston, Massachusetts
January 28, 1978

APPEARANCES:

As previously noted.

The Court: I want to state the Court's order and then the findings and conclusions that support it.

The Court Order portion is as follows: The motion is granted and it's ordered that Secretary Andrus be enjoined from receiving bids for the lease of this George's Bank area until further order of the Court; and the Defendant Intervenors, and perhaps the Defendant Secretary's motion that a bond be required from the Plaintiffs is denied.

The Court has considered on this preliminary aspect of the case both the likelihood of the Plaintiff prevailing on the merits in this case and has also balanced the harm to the extent that it is irreparable to the Plaintiff from de-

nial of the motion for preliminary injunctions against the irreparable harm to be suffered by the Defendants from its appliance, and finds that the irreparable harm suffered by the Plaintiffs from denial far outweighs that suffered—I mean the irreparable harm suffered by Plaintiffs from denial would be considerably greater than the irreparable harm suffered by the Defendants from allowance.

In connection with the issue of liability, and I will elaborate all these points over a period of thirty minutes or more, that the Court rules that for the Defendants' Secretary to receive bids on the 31st of January would be in violation of his duty under the OCS Lands Act; would also be a violation of the National Environmental Protection Act; and, furthermore, would under special circumstances be arbitrary and capricious. And, therefore, is further enjoinable in accordance with the provisions of the Administrative Procedures Act.

To clear up the word "receive" in the order that the Court directs be issued, the injunction is not to prohibit the opening of bids, the injunction is not technically in terms of preventing the sale. The injunction is in terms of forbidding him to accept or to receive bids.

The point here is that the Court is endeavoring by this type of order to prevent the Secretary from requiring a deposit of large sums of money by the bidders because if a deposit must, and it does, a bid must be accompanied by a deposit, and unless action is taken on the deposit or unless action is taken on the bid, the deposit must remain. And, therefore, there would be sizeable costs incurred by the Defendant Intervenors here were the injunction to run against the sale as distinguished from against the Secretary receiving bids.

If, on the other hand, the bids in some sense can already be said to have been received, the Court's alternative order is that the Secretary is enjoined from keeping them so that they must be returned to the bidders.

Now, turning to the findings and conclusions of the Court in greater detail, the first finding pertains to the uniqueness of the George's Bank facility. The Court agrees with defense counsel that every piece of real estate in the world is unique in one sense. Furthermore, that every case under NEPA is felt by the Plaintiffs to be the most important case in the world. Those are uniquenesses in a somewhat subjective sense.

But, I think apart from the subjective aspects of uniqueness in this case, there is an objective aspect that brings into play special obligations both on the part of the Secretary and on the part of the Court. Whether this statement in the Plaintiffs' memoranda is scientifically and precisely accurate—it is too soon to say.

Mind you, this is a preliminary matter. At the trial perhaps more precise facts will be developed. But, it is stated that as much as 15 percent of the world's fish protein is derived from George's Bank sources. This is no ordinary fishing ground. It is as important a natural resource as the people of this state and region will ever have to rely upon. It is the basis for one of the leading industries in this state and in this section. So the comparison of this case and the Secretary's duties in this case with other cases not involving as important a natural resource can, I think, be either inadequate or misleading.

The OCS Lands Act is the most important statute here applicable. I refer especially to Section 1333 of Title 43, which gives the Court jurisdiction, but more importantly Section 1332-B, and 134-A1. This now has to do with the Secretary's obligation, as I believe it to be, to act differently than what he is proposing to act by the sale next Tuesday. 1332-B of Title 43 provides in pertinent part: "This subchapter shall be construed in such manner"—well, I will read the whole thing.—"that the character as high seas of the waters above the Outer Continental Shelf and the right to navigation and fishing therein shall not be affected."

The first point to note with respect to this provision is that there may be a slight ambiguity with respect to the part applicable to fishing. Does the statute read "construed in such manner that fishing therein shall not be affected," or should it be read "in such manner that the right to fishing therein shall not be affected?" The addition of a couple of commas in that subsection might be helpful. I don't think there is a great deal hinges upon that distinction, but I note it, and I am not sure that at the trial it won't develop there is something to hinge on that distinction.

One of the briefs, or maybe a pleading, spoke about—uses a last word in that subsection, the word "abridged" so that it was made to read, "And the right to navigation and fishing therein shall not be abridged." Well, if the word really were "abridged," it would solve the ambiguity that I have described. We would be talking in terms of the right to fishing, rather than fishing. No question, however, on either basis, that the Secretary of the Interior is directing as a matter of policy not to affect fishing if it can possibly be avoided. His duty is further prescribed in Section 1334-A1, where it says, in the second sentence: "The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf and the protection of correlative rights therein. And, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this Chapter." There are other references in the statute, but those are the principal ones.

This duty of the Secretary to be especially concerned and to be the guardian in a sense of fishing in the Outer Continental Shelf waters, is underscored by the enactment of legislation passed more recently than the Act principally in question. And obviously I refer to the Fisheries Act,

that is to say the Fishery Conservation and Management Act, which was passed in 1976 and became effective in 1977, and also the Coastal Zone Management Act. As I endeavored to explain to one of plaintiff's counsel yesterday morning, these statutes are not directly applicable to this case in my view, although I may have a different opinion after the trial. However, they do, without question in my mind, underscore the duty of the Secretary under the OCS Lands Act, and it is no strain of statutory construction in my opinion to state that in combination with the OCS Lands Act they place upon the Secretary of the Interior the affirmative duty of taking all steps reasonably possible to meet the Congressional objective set forth in the FCNA Act, that is to say, the preservation of fishery resources and preservation and conservation of this natural resource, as well as the objectives of the OCS Lands Act.

In my opinion, it would be a violation of this duty for the Secretary of the Interior to receive the bids on the George's Bank area previous to final Congressional action on the legislation pending before it, to which frequent reference has been made. I don't know quite what number to call the legislation. It was known as Senate Number 9 in the last session; it was known as House 1614 at another time. But I have reference to three items especially of legislation which is pending before Congress, and whose enactment is expected in the near future.

One of the provisions has to do with the establishment of a fund that would provide for payment to a person who is damaged by oil spills in situations where the source of the spill or the blame for the damage could not be ascertained.

Another provision has to do with the compensation of fishermen for damage to their fishing gear under similar circumstances.

A third has to do with providing compensation for lessees under the Act should their operations be suspended by an administrative order of the Secretary of the Interior.

In not waiting for this legislation to be enacted, the Secretary has done less than he should, in my opinion, to preserve the natural resource on the George's Bank which he is bound to do. The effect of the first two proposals having to do with the establishment of compensation funds would in effect compel the lessees of these tracts to pay for damages even when their liability could not be established. The effect of such an absolute liability provision would, plaintiffs have contended, and the Court adopts this contention, strengthen and increase measures taken by the lessees to prevent accidental damage and accidental spills of oil and accidental leakage of oil and damage of other sorts.

The defendants have suggested in closing argument this morning that this can be done administratively if Congress fails to enact the legislation that is pending before it. The Court has a different understanding. The whole point, as I understand it, of the Secretary seeking this legislation from the Congress as being of the most urgent necessity, is premised on his conclusion that he lacks power to accomplish these ends administratively.

Therefore, action by Congress is essential, and it is his refusal or declining to await Congressional action here which the Court believes to be a violation of his duty. He is violating his duty under the statute also—excuse me, I think there may have been one other point I wanted to insert here with respect to the enactment of this legislation.

It is said by counsel in argument that this problem will be resolved when Congress enacts the legislation. But that simply begs the question. The question is whether Congress will or will not enact the legislation. If there were a certainty that the legislation would be enacted, or if there were a certainty that when enacted it could be constitutionally retroactive, or if there were a certainty that the Secretary could accomplish the same purposes administratively, well then the question before the Court would be entirely different. But on each of those questions, the probabilities in

my analysis favor the plaintiff's contentions. We know that Congress has not acted; we don't know whether it ever will. There is doubt whether it can constitutionally enact this legislation retroactively, and that last point requires at least brief elaboration.

The question whether if Congress should pass a bill saying that there should be compensation funds for fishermen's gear and for strict liability from oil spills is important. We know, number one, that Congress may not pass that legislation at all. Number two, it may not make the legislation retroactive. But let's assume that the legislation is enacted and it's made retroactive, because that's the way the proposed law now stands. It's open to contention by the lessees that since they obtained the leases by the acceptance of bids previous to enactment of the legislation by Congress, that Congress couldn't constitutionally take it away from them unless compensation should be provided for in the bill. That is to say, if you bid and you obtain a contract or a piece of property or a valuable right at an auction sale, they can't change the terms on you retroactively unless they compensate you for it.

This is the principle underlying the case often cited by the plaintiffs here, the Union Oil Company case, which of course is not precisely applicable here to this case, but is nevertheless valuable precedent—that's at 512 Fed. 2d Reports, Page 743 at 748 and 750, 9th Circuit, 1975.

Furthermore, and this now goes to a slightly different point, the Secretary of the Interior, we find, would violate not only the duties flowing directly from the statute, but also the National Environmental Protection Act, by relying on an inadequate Environmental Impact Statement in the matter of the costs and benefits of the delay which the Court says he is bound under the law to grant.

There is a dual aspect of this finding. The Court finds that it is a violation of the Secretary's duty under the OCS Lands Act to go forward with this proposed sale on the basis of an EIS so inadequate in this regard. And then on

that ground, and on an additional ground to be stated, finds that the Secretary is in violation of the National EPA in that the Environmental Impact Statement is insufficient as a matter of law in that particular and especial respect, but in other respects as well.

The Court has considered the contents of the Program Decision Option Document as being properly considered together with the EIS. That is to say, in finding that the Secretary has violated both the OCS Lands Act and the Protection Act, which we will call NEPA, by acting without a sufficient EIS, that to say Environmental Impact Statement in this regard, the Court has considered the PDOD, and indeed other documents emanating from the Department of the Interior, as well as the EIS. My point is, I am not adopting a restricted definition of the EIS. I mean by that the whole package of papers on which the Secretary has presumably relied.

The portion of the EIS that is most relevant at this point is Pages 1321 and 1322 of Volume III of the final environmental statement. There the fact of the pending legislation is referred to and a mention made to the problem of the retroactivity. But, this is all together inadequate in the Court's opinion.

There is in the PDUP a few pages analyzing the costs and benefits of the delay which the Court says under the particular circumstances it is the Secretary's duty to grant. But there again, the ecological aspect of this proposed legislation is not even adverted to. By that I refer to the benefit that this would arguably have on reducing damage.

The likelihood of this type of damage, measures to be taken to reduce it, arguments pro and con, the enactment of this legislation, all are treated in a cursory manner in my opinion.

The last paragraph on Page 1322 states, "If this proposed sale were held prior to the establishment of oil spill liability legislation, the legislation could be made applicable to operations on leases issuing from this sale." That

simply is an over-simplification of the problem and it is an inadequate over-simplification.

The Court has already alluded to the complex legal aspects of making legislation retroactive without violating the Constitution. This problem is not simply a speculative problem. The Court refers to the pendency in the Federal Court in California at this time of the so-called WOGA case, standing for Western Oil and Gas Association case, where holding of leases have challenged the authority of the Secretary to suspend the operations on the particular leases.

Here again defense counsel have argued but that problem will not exist under legislation which has been proposed to the Congress if that legislation is enacted. The Court's response to that contention is that the big word in that argument is the smallest. That is the word "if". If it's enacted, but we know there is no certainty with respect to Congressional action in this area.

It was thought last year that the Congress was, and I think perhaps even previously, the Congress was on the threshold of enacting this legislation and it did not materialize. The rights of the Plaintiffs here cannot be made to rest on this type of contingency.

Turning to the violation which the Court believes has existed with respect to the NEPA statute, I have alluded to the inadequate setting forth of the factors in the nature of costs and benefits with respect to the advantages and disadvantages of postponement of these sales until Congress has acted.

Another deficiency in the EIS is the omission to discussion of the possible use of this area as a marine sanctuary. The Court here does not refer to the obligations under the statute of the progression of the studies to be made under the statute. The Court refers simply to an obvious valuable long-range important alternative use which according to Plaintiffs' counsel, and I have not heard to the contrary, did not even rate so much as a paragraph

in the EIS. This is not to say there wasn't abundant discussion of marine life and the conditions of fish and other marine life in the area in the EIS. Of course, there is hundreds of pages that deal with that point.

My point is somewhat different. It has to do with the setting aside of this area as a marine sanctuary, but the possibility that this area is more valuable to the country over the indefinite future as a breeding ground for fish and other marine life than it is as a source of oil and gas.

Here is another possible deficiency in the EIS. It was mentioned by Plaintiffs' counsel, and I can't recall a response to the contrary by the defense, and that is there was insufficient specific reference to the damage to beaches on Martha's Vineyard and some sections of Cape Cod and reliance by the authors of the EIS on statistics applicable to Long Island.

Another deficiency is that stated by the Director of Federal Activities of the United States Environmental Protection Agency in a letter to the Department dated October 4, 1977. The Court is aware of the response by the Secretary dated December 2, 1977, but is not satisfied that it is a complete response. It is, in fact, satisfied that it is an incomplete response. The Court has not yet had an opportunity to read completely the Environmental Impact Statement. The Court has read only portions of it.

In the Suffolk County case, the Eastern District of New York, which appears on appeal, at Volume 562 Federal Reports 2nd, Page 1368, the trial judge devoted eleven days to hearing an application for preliminary injunction in a case far less complicated than this one. So that here the parties and the Court have been operating under considerable difficulty because of time constraints.

The Court thinks it likely on the basis of the deficiencies in the EIS already demonstrated by the Plaintiff that when there is time for fuller study of this situation at a trial on the merits, further insufficiencies of the EIS will appear.

The Court finds additionally with respect to the liability

here that under the particular circumstances it would be arbitrary and capricious for the Secretary Andrus to conduct this sale on Tuesday of next week. The first important finding in this regard is that the Secretary has, himself, on numerous occasions stated, in effect, that the legislation not yet enacted is urgently needed for the implementation of the lease program.

And, I quote directly from some of the Secretary's recent pronouncements in this matter. He said in a release dated January 23, 1978, "I am pleased that the Rules Committee has responded favorably to the need for a vote by the entire House of Representatives on this crucial measure." This refers to the proposed legislation.

On November 1, 1977, Mr. Andrus wrote to Congressman Studds of Massachusetts, and this is the other side of the same coin, "As you know, I have made many statements in recent months expressing a commitment to maintaining a lease planning schedule once that schedule has been decided upon."

And then later in the same paragraph, "I have issued a proposed Notice of Sale for Sale 42 and am awaiting comments from the affected states before I make a final decision and issue a Notice of Sale. However, given the important of the OCS amendments to the administration and its importance as part of the President's energy package, I would be willing to re-examine your request in January if you feel that the request is appropriate at that time."

On January 17, 1978, in a general press conference the opening statement by the Secretary includes the following: "With Congress about to return to session, we are looking for quick action on some very vitally important legislation that we have pending; others that we will submit. The most immediate from a short-range standpoint are the amendments to the OCS Act. I think these should be passed quickly so that we can get on with our Federal Leasing Program with the assurance that the environment and the public interest will be adequately safeguarded not only for today but for the future."

Then he was asked a question later in the press conference, "Are you going to go ahead or have you made your decision in the George's Bank lease sale?" Secretary Andrus—and this, mind you, is the 17th of January—"No, I have not made the decision yet as to whether we will hold that lease up. We have until the 30th day of this month to do that. I hope it will not be necessary because I hope that . . . or even to consider that we would hold it up. I have made no decision."

Question: "Would you hold it up if nothing happens and the House rules?" Answer: "No, I am not prepared to say that. I think I made it clear I don't want to hold it up. I promised a schedule. I would like to keep it."

And then attached to an affidavit by one Spencer Appalonio, is a letter from The White House to the Chairman of the New England Fishery Management Council dated December 17, 1977, signed William R. Deller, Assistant Director, Domestic Policy Staff, and assistant to Stuart Eisenstadt. This is in response to a telegram from Mr. McLeod. And the pertinent paragraph states as follows, as I quote, "The Carter Administration strongly supports enactments of amendments to the Outer Continental Shelf Claimants Act to insure adequate protection for fisheries and the marine environment. Secretary of the Interior, Cecil Andrus, has publicly stated that he will decide in January whether to postpone the lease sale presently schedule for the North Atlantic."

Next, it's important to mention that the EIS, itself, speaks about the possibility of postponing the sale. The Secretary absent the Court injunction, which now will relieve him of the necessity of making this decision, would be deciding at the very last minute whether to go forward without awaiting Congressional action or to postpone the sale because of inaction by the Congress. He has spoken about the critical importance of the legislation, and for him to act in a matter of such consequence that the decision will affect generations unborn in this area, when developments crucial to the interests of the parties would occur within a matter of months, would in the Court's opinion be arbitrary and capricious.

The Court notes the emphasis by the Secretary on his having given his word to the industry that having established a schedule not just with respect to Sale 42 out here in George's Bank but with respect to other options in other sections of the country and with respect to other tracts, he would stick to that schedule and there is, indeed, the obvious interest in promoting industry stability and sticking to one's word. But, under this special circumstance, it would in this Court's view be arbitrary and capricious for him to make a decision on the basis of his having promised a sale and an unwillingness to postpone it in order not to inconvenience people who are counting upon the bids being received and opened on the 31st of January.

Defense counsel have argued, and indeed correctly, that it is not up to the Court to review the why and how of the administrative official's decision. But where the administrative official involved makes it appear that the issue is so close that he will not make a final decision until the absolute last moment, and where he encourages people to think on the one hand that the sale would go through on the 31st, and then on the other hand leads people to think and expect that the sale may be postponed, and then reverses his stand, or appears to reverse his stand at the next occasion for making a statement, when the Secretary vascillates in the fashion exhibited here without explaining the reason therefor, it is in my opinion open to the Court to conclude reasonably and consistently with the rule of reason that's required to be observed in these situations that the action is arbitrary and capricious.

That concludes the Court's statement with respect to issues of liability, except that sort of a subissue on the question of possible laches or unreasonable delay by the plaintiffs in acting. The Court has considered the arguments, and finds that there are absolutely—there is no

factual foundation for charging the plaintiffs with any untoward or unexplained, unwarranted delay in this situation.

As stated by the plaintiffs, this suit wasn't ripe for institution until after the final notice. There was a delay of only nineteen days between the final notice and the filing of the complaint, and during that time the plaintiffs were casting about to see what they could negotiate.

Before turning to the issue of irreparable harm and the bond, let me ask Mr. Ryan to come up, because he may have something in mind that I omitted to state.

I should have perhaps mentioned a little more with respect to the legal analysis of the violation of the NEPA, and refer particularly to the County of Suffolk vs. Secretary of Interior case, 562 F. 2d 1368, especially at page 1383. And of course I am not endeavoring to substitute the Court's view of what the Secretary should have done here, but am rather applying what's called the rule of reason to see whether the Environmental Impact Statement, as increased by the PDOD and other documents, supports —I should say presents a panoply of considerations of substance which have to be in the mind of the decision maker at the time of his making the decision.

With respect to the EIS in this situation, I would say that in numerous respects, of which the Court has pointed out three or four, it's perhaps adequate on identification and short on evaluation. It simply does not present a sufficient cost-benefit analysis in a number of areas to have enabled the Secretary to have decided the issue before him as reliably as the law insists.

Now, with respect to the County of Suffolk case, I have already referred to one distinction, that is to say the existence here of this natural resource of vastly great importance. The other aspect of the case I will refer to when we talk about the irreparability of the harm, and let me get to that immediately.

The Court adopts the analysis of irreparable harm sub-

mitted by plaintiffs in final argument and rejects the analysis submitted by defense counsel. If these leases were to have gone forward next Tuesday, there's no way that the plaintiffs could be assured that there would ever be in place the liability funds that we spoke about, having in mind the possibility that Congress could enact or wouldn't enact it in a constitutional fashion, and the Secretary's inability to fill the gap administratively.

Secondly, the harm to be suffered by the plaintiffs would be relatively soon. It would be immediate in the sense of a deprivation of the opportunity to develop an effective management plan by the New England Council—excuse me. I may have overstated at that point, and don't want to do so. The damage would be immediate in the sense that a large portion of the considerations to be considered in formulating the plan—I must get the right name for it, under the Fisheries Act of 1976—it's called the Fishery Management Plan. This would be the one to be formulated by the New England Council, Fishery Management Council.

A number of considerations important for that Council in the formulation of that plan would be mooted, in my view, by the granting of these leases. The damage would be less immediate, but would be in the near future in an ecological sense, that is to say in a physical sense. And the Court obviously in this situation relies on Exhibit 6, Volume I of the Report to the President by the Council on Environmental Quality on Page 58, which states, quote: "Exploratory drilling is one of the most hazardous steps in developing offshore oil and gas. The potential hazard stems from the possibility of blowout, the sudden surge of oil or gas pressure up the drill hole causing loss of control over the well. Although most blowouts involve only gas, large quantities of oil may be released to pollute the marine environment. This ignited oil and gas may burn out of control, threatening personnel and equipment," close quote.

The plaintiffs will suffer harm furthermore because of the elimination of the possibility of designating this area

as a marine sanctuary. It's just not possible if this goes through. Basically the harm done would be the irretrievable loss of an opportunity, indeed the requirement of carrying out the objectives of the Congress in enacting the '76 Fishery Conservation and Management Act, and other legislation in this area without specifying each particular statutory provision.

We are not talking here, and I think this is important to emphasize, about prohibiting leasing of oil and gas tracts in the George's Bank area. None of the plaintiffs has conceded that such exploration and exploitation be banned outright. The plaintiffs are looking for a delay of a relatively few months to preserve a resource that has taken millions of years to accrue, and which will be with us for better or worse for untold centuries to come.

The opposing considerations here are use for a period of about twenty years, to begin only five or six years from now, of this section as a source of oil and gas, as against the preservation of the natural resource element here for the indefinite future. It is in this respect that the case is distinguishable from the County of Suffolk case on the issue of irreparable harm. There, there was no issue such as the pendency of this important Congressional legislation. There, there could be no irreversible adverse effects of the action proposed to be taken by the Secretary until the period of about three years from the date of the decision.

Here the damage is imminent, and for reasons already explained irreversible except under a variety of contingencies which cannot be wholly eliminated. The Court, as against this type of damage, has contrasted the damage suffered by the defendants.

With respect to money damages, the argument of counsel for the Secretary is to the effect that revenues will be diminished by the bonuses that will not be received from the bids because the bids won't be received next Tuesday morning. This again misconceives the effect of the Court's ruling today. The Court is not voiding leases; the Court is

not ordering that this tract or these tracts never be leased. The Court is simply ordering that until further notice, the Secretary not receive these bids. That further notice may be a fairly short period of time. But it's not a denial of this bonus money to the government; it is simply a postponement of the money to the government.

With respect to sources of energy, it is true that, for a relatively short period of time, the development of the energy in this area will be postponed. But, taking the frequent estimate of the use of these wells or gas fields covering a period of approximately twenty years, what's twenty years over the course of the next century? The oil's there to the extent that it exists there. If it's not going to be obtained for energy purposes in this country for a six or twelve months, or for that matter a six or twelve-year period longer than it might otherwise be, is that going to have an overall effect of any substance in this situation?

The Court in ruling that this type of harm is not irreparable, emphasizes the word "irreparable." It is reparable—it will be reparable when the energy is obtained.

With respect to the claims of the intervenors, the Court does not see how their damage is substantial. Of course, it has been expensive to them to prepare to make bids. But the Court again has not cancelled the bids or cancelled the sale; it has simply ordered that it be postponed.

Now, presumably when bids are proposed, the bidders will deduct from the amounts that they bid the expenses incident to the postponement of these sales. The Court is under no illusions but what it is costly to raise money and to pay interest on money and to spend money and to get employees in place. So what it comes down to is that when the bids are re-presented at a future date, the bids will, to the extent of these expenses that have been incurred, be submitted in lesser sums. So the loser here, if there should be a loss from a financial point of view, will be the federal government rather than the bidders themselves. They're

in the business of bidding, they have invested these sums in employment and capital and other types of expenditures in the knowledge that the Secretary might decide to postpone the sales. Who of us here today knows but what Mr. Andrus might, absent this Court order, on Monday night next, have decided to postpone the sales? Had he done so, it would simply have been one of the contingencies which was in the minds of the bidders when they put their bids together.

So, certainly, the damage to be suffered by the Intervenors here is no different by virtue of the sale having been called off by Court Order than it is on account of the sale having been called off by the Secretary himself. So that even with respect to the lesser amount of income, of receipts, that the Government might get should the oil companies decide to reduce their bids because of the cost to them of this postponement, it will be offset, that is to say the reduction will be offset to some extent by the increased revenues that the Government may get from the taxes on our Massachusetts fishing industry during the period of time while the matter is under further consideration both in the Office of the Secretary and in the Congress.

This is not simply a one-way proposition. It isn't as if what is out here in George's Bank is oil and gas and nothing but. It is the center of a fishing industry whose value is known throughout the entire world. So, the Court has endeavored to consider the harm that would be suffered by the Plaintiffs and the extent of its irreparability and that simply suffered by the Defendants. And on balance finds that it is not close.

We are comparing on the one hand taking away aspects of a conceivably valuable resource for the indefinite future. And on the other hand, we are talking about a delay of a few months in an area where bureaucratic delay is the rule instead of the exception.

Now, on the matter of the bond, it is too late to spend too much time on it. As a matter of fact, I am supposed

to be picked up in my home, fifteen miles from here, at 5:25 so that is going to require some attention, too, and everyone must feel the same way.

I don't suppose the question of whether the Plaintiffs should be compelled to post a bond is much in doubt in the minds of anyone in this courtroom at this juncture. The Court has considered the arguments presented and simply concludes that it is within the Court's discretion in a public interest case of this sort to direct that the injunction issue without the posting of the bond, security at least, as specified in Rule 65-C of the Federal Rules of Civil Procedure.

If there ever was a public interest case, this is it. And, I have already endeavored to explain that over the long run the leasors and the Government will not be damaged in a substantial financial way by the imposition of this injunction, even should it be held later to have been improvidently granted.

Finally, I say in conclusion, there are so many aspects of this case to be discussed and probably should be discussed, telling points that were made. And, I will give you just a single example. The Notice of Bid or I should say Lease Form here, that talks about regulations being issued by the Secretary, itself could be the subject of a lengthy dissertation—better written than oral, I might say. There are many things that the Plaintiffs contended to be attended to and have to be regulated here that can't even be the subject of regulation by the Secretary of the Interior.

So the ultimate basis, I guess, of the Court's ruling is not to say that haste makes waste, because to do so would be substituting the Court's judgment for the Secretary of the Interior. I say that the Secretary can decide what course best to follow only when he complies with the mandates of the statutes applicable to the performance of his duties; especially the OCA Land Act and NEPA which, I believe, he would have violated were he to have gone forward next Tuesday with the plans as announced.

That concludes the Court's statement. I don't expect to file a written form of preliminary injunction today because

of the lack of a secretary and because of the other fact that I have already referred to. Conceivably the Plaintiffs have a form in their briefcases, conceivably it could be done by endorsement on the motion itself; otherwise, it would just be done first thing Monday morning. So, I think first thing Monday morning you should get over a form of preliminary injunction; show it to counsel for the Defendants, if you can; use the word "receipt" and make it receipt of the bids or retention if they have already been received to guard against that; and provide specifically that for reasons stated in the Court's memorandum of decision dated today that no bond is required under Rule 65-C.

Yes, sir.

Mr. Bruce: Your Honor, if I may. I think your Honor's intention is clear, but just so there is no doubt in terms of the wording of your Honor's order, I would ask that you make it clear that the Secretary of the Interior is to open no bids within the meaning of your order and any bids which he might receive he is obliged to return.

The Court: No, it is that he not receive any bids, thus relieving any bidder from the necessity of depositing any money.

Mr. Bruce: Your Honor, my point is, and I can't say this with certainty, but it is possible that some bids have already been submitted. And, I think your Honor's order ought to be absolutely clear that those bids should not be opened by the Secretary because once opened very valuable competitive information is revealed.

The Court: That also is the Court's intention and that should be added to the form of order. And, I am sure that you and counsel for the Plaintiffs can work that out. In fact, I am sure that if you wanted to propose a form that would be acceptable to them, you certainly have the Court's intention. And now we will just briefly recess.

Mr. Bruce: Are you leaving the bench?

The Court: I was going to, but if you have something else—

Mr. Bruce: I would like to make, and I do it in the form either of a Motion for Stay which must be made here before it can be made in the Appealant Court or in the alternative for a Motion to Reconsideration.

The Court: Reconsidering what?

Mr. Bruce: Of the ruling your Honor has just made.

The Court: I will deny that without hearing. Of course I won't reconsider something I have just finished doing.

Mr. Bruce: My point in connection with either one or the other—

The Court: I will consider a Motion for Stay.

Mr. Bruce: I would like to enter an affidavit of David P. Holt on an issue that your Honor had developed here that wasn't developed before.

The Court: I will not entertain any additional evidence.

Mr. Bruce: Can I make a record on my proffer?

The Court: Well, this is what is difficult in my view. You are doing it at 4:50 on a Saturday afternoon. That's the problem I have. Why wasn't whatever you have there handed in earlier either today or yesterday?

Mr. Bruce: The reason being, your Honor, with the speed with which this hearing was conducted, necessarily so given the time it was filed, it didn't appear responsive to the kinds of issues that your Honor seemed concerned about. And rather than burden the record with that kind of material, it wasn't offered.

Obviously your Honor is concerned with these. I think it would make a more complete record.

The Court: Well, I think you are out of luck. I think I have explained that the record stands as it existed when I came out here at 3:30 this afternoon. I am not going to start trying to fit into this jigsaw puzzle something new that you wish to add in at this late hour. You had, in my opinion, every opportunity to offer any paper that you had in your briefcase, and if you felt that it was immaterial, you can urge that argument as well as others elsewhere.

I simply will not reopen the record. Now, if you have something to stay that is a little different.

Mr. Bruce: Let me present the Motion for Stay, your Honor, just for the Appealant Court so it is clear that a motion was made here.

The Court: What is the motion—to stay what?

Mr. Bruce: To stay the effect of your preliminary order.

The Court: My order was to the effect of staying the Secretary's action, so how can I grant a stay of my order to stay the Secretary's action?

Mr. Bruce: I do this because the Federal Rules of Civil Procedure seem to compel it as a preliminary to filing a similar motion in the Appealant Court.

The Court: I certainly would entertain it. If it is anything necessary to preserve your rights, of course I will entertain the motion.

Well, now, I have in mind these affidavits. Incidentally, I read every one of your affidavits in support of the Motion for Intervention. I think I have read every one of your legal memoranda. And in considering those, the Motion for Stay is denied, and I will so endorse it.

Mr. Schroeder: The Federal defense would make a similar motion.

The Court: Do you have it in writing?

Mr. Schroeder: We do not have it in writing.

The Court: I will rule orally on the oral motion which is to deny the Motion to Stay.

Mr. Schroeder: Thank you, your Honor.

Mr. Bruce: Your Honor, further what I would call a procedural nature but a very important one in the light of the timing of this litigation and a possible appeal, perhaps we can obtain a stipulation from counsel or perhaps the Court would so rule upon my motion that the order which your Honor has just dictated be deemed a final order.

I would like to file a Notice of Appeal with the Clerk of your Court. Now, the reason, obviously, being that we want to start the appeal process as soon as possible and to await an entry of an order on Monday would delay further appeal.

The Court: Let's hear what the Plaintiffs have to say.

Mr. Foy: We will stipulate to that.

The Court: We are willing to do that, but it will be supplemented by something in writing.

Mr. Bruce: Yes, your Honor, but here is my letter of appeal, your Honor.

The Court: Anything further?

Mr. Bruce: Lastly, your Honor, although your Honor has said he will not receive it for purposes of appeal and record, I would like to tender these two materials as a proffer.

The Court: Certainly. I will not look at them, but we are happy to have the Clerk look at them.

Mr. Bruce: For the record, I distribute an affidavit of Doctor David Holt on the one hand; and, second, on the other hand, a study with reference to the Impact Statement, Volume III, Page 1677, the affects on commercial fishing of petroleum development in the northeastern United States. It is offered for that limited purpose.

The Court: Fine. Anything else?

Mr. Nasif: For the record, the Defendants have also filed with the Departments of this Court a Notice of Appeal to this Court Order granting the preliminary injunction.

The Court: Thank you. We will now again recess.

(Whereupon, the hearing was adjourned.)